

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Tony L. Ellison

v.

Civil No. 10-cv-351-SM

State of New Hampshire et al.¹

REPORT AND RECOMMENDATION

Before the Court is Tony Ellison's complaint (doc. no. 1) alleging that defendants have violated his civil rights in the collection of restitution he was ordered to pay as part of the sentence for his incarcerating offenses. Because Ellison is a prisoner proceeding pro se,² the matter is before me for preliminary review to determine, among other things, whether the complaint states any claim upon which relief might be granted and whether it invokes the subject matter jurisdiction of this

¹In addition to the State of New Hampshire, Ellison has named the following individuals as defendants to this action: Deborah Nelson of the New Hampshire Department of Corrections' Exeter Field Office; Assistant Rockingham County Attorney Brad Bolton; Mark C. Thompson, Director of Administration for the New Hampshire Victims' Assistance Commission ("VAC"); Bette Jane Riordan, VAC Coordinator; Assistant Attorney General Anthony Blenkinsop; New Hampshire Superior Court Judges Patricia Coffey and John Lewis; and New Hampshire Supreme Court Justices John Broderick, Linda Dalianis, James Duggan, Gary Hicks, and Carol Ann Conboy.

²Ellison objects to being referred to as a "pro se" litigant and requests that he be henceforth referred to as a litigant "sui juris." I decline to so refer to plaintiff.

Court. See 28 U.S.C. § 1915A; United States District Court for the District of New Hampshire Local Rule ("LR") 4.3(d)(2).

Standard of Review

Under this Court's local rules, when an incarcerated person commences an action pro se and in forma pauperis, the Magistrate Judge conducts a preliminary review. LR 4.3(d)(2). In conducting the preliminary review, the Court construes all of the factual assertions in the pro se pleadings liberally, however inartfully pleaded. See Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam) (following Estelle v. Gamble, 429 U.S. 97, 106 (1976), to construe pro se pleadings liberally in favor of the pro se party). "The policy behind affording pro se plaintiffs liberal interpretation is that if they present sufficient facts, the court may intuit the correct cause of action, even if it was imperfectly pled." Ahmed v. Rosenblatt, 118 F.3d 886, 890 (1st Cir. 1997); see also Castro v. United States, 540 U.S. 375, 381 (2003) (courts may construe pro se pleadings to avoid inappropriately stringent rules and unnecessary dismissals). This review ensures that pro se pleadings are given fair and meaningful consideration.

To determine if a pro se complaint states any claim upon which relief could be granted, the Court must consider whether the complaint, construed liberally, Erickson, 551 U.S. at 94, "contain[s] sufficient factual matter, accepted as true, to

'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, ___ U.S. ___, ___, 129 S. Ct. 1937, 1949 (2009) (citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. Inferences reasonably drawn from the plaintiff's factual allegations must be accepted as true, but the Court is not bound to credit legal conclusions, labels, or naked assertions, "devoid of 'further factual enhancement.'" Id. (citation omitted). Determining if a complaint sufficiently states such a claim for relief is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 1950 (citation omitted).

Background

Tony Ellison is serving a 30-60 year sentence for sexual offenses against his three minor children. Part of his sentence, imposed in 2001, is an order that he pay the out-of-pocket and uninsured costs of counseling for his children, up to a maximum of \$10,000 per child. Restitution was made payable through the New Hampshire Department of Corrections ("DOC").

Four years into Ellison's sentence, the DOC began deducting money from his inmate account to be paid toward his restitution obligation. After the deductions began, Ellison requested

documentation from the DOC proving the costs incurred for which he was being held responsible. On February 28, 2006, Ellison filed a motion in the trial court to compel the DOC to provide him with its records regarding his restitution obligation, including a comprehensive accounting of the costs of the victims' counseling. The New Hampshire Victims' Assistance Commission ("VAC") had apparently provided cash for certain out-of-pocket expenses for the victims' counseling, for which Ellison was ultimately responsible. Ellison sought documentation and an accounting of those expenditures from the VAC as well.

On March 26, 2007, Superior Court Judge Patricia Coffey ordered the DOC to provide restitution records to Ellison. Deborah Nelson, the DOC Officer responsible for managing Ellison's restitution collection and payments, provided Ellison with records the DOC received from the victims' mother. No documentation was provided by the VAC. In addition to the counseling costs for each of the three victims, counseling costs and the cost of lost wages for the victims' mother were also included in the accounting.

Ellison successfully petitioned the Court to direct that the victims' mother's counseling and lost wages expenses not be paid by him, as those expenses were not part of the initial sentencing order. On June 5, 2006, Judge Coffey ordered the DOC

to provide a comprehensive accounting to Ellison for the victims' expenses. On June 14, 2006, the DOC provided Ellison with receipts and dates of service received from the victims' mother. The VAC, in turn, provided a letter with amounts spent, but without documentation or other accounting of the expenses it incurred on behalf of the victims. Based on that information, Judge Coffey determined that Ellison was responsible only for restitution of the counseling costs of his victims and not their mother's counseling or other expenses. Further, Judge Coffey determined that the victims had incurred, at that time, out-of-pocket costs of \$8322.60, plus a 17% administrative fee. Ellison's obligation that had been accrued at that time, therefore, was \$9737.33. Ellison's objection to Judge Coffey's Order and his motion to reconsider that Order were denied.

Shortly thereafter, the DOC stopped deducting restitution payments from Ellison's inmate account. Because the deductions stopped, Ellison did not appeal the Superior Court order. Eventually, the DOC again began to deduct restitution payments from Ellison's inmate account.

On September 2, 2008, Ellison again petitioned the Superior Court to determine the total amount of his restitution obligation that had accrued. A hearing on his motion was scheduled for January 29, 2009. At that time, Superior Court

Judge John Lewis ordered that Ellison be provided with documentation of the costs of restitution within thirty days. On April 1, 2009, the Court issued an order directing that the documents, which Ellison had not yet received, be submitted for in camera review. Ellison requested to be present at the in camera review but his request was denied. On June 12, 2009, after conducting the in camera review, Judge Lewis sealed the records and denied Ellison's motion for documentation of the restitution amounts charged. Judge Lewis kept the existing restitution order in place. Ellison's motion to reconsider was denied. Ellison filed a notice of appeal in the New Hampshire Supreme Court which was declined. Two motions to reconsider the declination were also denied.

The Claims

Ellison raises the following claims for relief in this Court³:

1. Defendants violated Ellison's rights to due process, a fair trial, and equal protection, as protected by the Fifth, Sixth, and Fourteenth Amendments, and state law, by failing to provide Ellison with records and specific accounting for restitution amounts for which he is liable;

³The claims, as identified herein, will be considered to be the claims raised in the complaint for all purposes. If Ellison disagrees with the identification of the claims herein, he must do so by properly objecting to this Report and Recommendation or by properly filing a motion to amend his complaint.

2. Defendants intentionally conspired with one another to commit fraud against Ellison by failing to present proof of Ellison's restitution obligation, in violation of Ellison's rights under federal and state law; and

3. Defendants committed theft when they took, or caused to be taken, money out of Ellison's inmate account for restitution, without Ellison's consent and without proper documentation of Ellison's restitution obligation, in violation of Ellison's rights under federal and state law.

Discussion

I. Rooker-Feldman Doctrine

"The Rooker-Feldman doctrine precludes the 'losing party in state court [from filing] suit in federal court after the state proceedings [have] ended, complaining of an injury caused by the state court judgment - and seeking review and rejection of that judgment.'" Coggeshall v. Mass. Bd. of Registration of Psychologists, 604 F.3d 658, 63 (1st Cir. 2010) (quoting Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 291 (2005)). The Rooker-Feldman doctrine -- named for a line of cases derived from D.C. Ct. App. v. Feldman, 460 U.S. 462 (1983) and Rooker v. Fid. Trust Co., 263 U.S. 413 (1923) -- "precludes [federal district] courts from exercising subject matter jurisdiction where the issues presented in the case are 'inextricably intertwined' with questions previously adjudicated

by a state court, such that the federal district court would be . . . reviewing a state court decision for error.” Mills v. Harmon Law Offices, P.C., 344 F.3d 42, 44 (1st Cir. 2003) (footnote and citations omitted); see also Hill v. Town of Conway, 193 F.3d 33, 39 (1st Cir. 1999). As explained below, Rooker-Feldman precludes this court from exercising jurisdiction over Ellison’s assertion that his rights have been violated in the state courts.

A. State Proceedings Have Ended

Rooker-Feldman applies when the losing party in state court files suit in federal court after the state proceedings have ended. See Federacion de Maestros v. Junta de Relaciones del Trabajo, 410 F.3d 17, 21 (1st Cir. 2005) (citations omitted). A court will find that underlying state court proceedings have ended if the highest state court in which review is available has affirmed the judgment below and nothing is left to be resolved, rendering the judgment susceptible to certiorari review under 28 U.S.C. § 1257. See Federacion, 410 F.3d at 24-25. Here, Ellison states that he fully litigated this matter in Superior Court and, upon losing, filed a notice of appeal which was declined. Accordingly, the Superior Court’s order denying Ellison relief is a final judgment in this matter. The complaint leaves no doubt that the state court matter is concluded.

B. Claims Are Inextricably Intertwined

Rooker-Feldman precludes an exercise of jurisdiction over certain federal claims that are "inextricably intertwined" with issues decided by the state courts. Hill, 193 F.3d at 39. Claims are "inextricably intertwined" if "the federal claim succeeds only to the extent that the state court wrongly decided the issues before it.'" Id. (quoting Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 23, 25 (1987) (Marshall, J., concurring)).

A litigant may not seek to reverse a final state court judgment simply by recasting his complaint in the form of a civil rights action. See Fortune v. Mulherrin, 533 F.2d 21, 22 (1st Cir. 1976); cf. Miller v. Nichols, 586 F.3d 53, 59 (1st Cir. 2009) (Rooker-Feldman bars jurisdiction where parties who lost in state court seek review and rejection of state court judgment on legal grounds not actually litigated in state court). The proper recourse for a litigant in the state courts who is unhappy with the decisions of those courts is to pursue his appeal through the state appellate process, and then to the United States Supreme Court. See Miller, 586 F.3d at 59 ("Only the Supreme Court of the United States may invalidate state court civil judgments.").

Here, Ellison seeks to relitigate his complaints surrounding the documentation of his restitution obligations, and states that the denial of relief in the state courts worked

a violation of his right to equal protection and "fundamental fairness." This is no more than Ellison's effort to recast the matter already litigated as a civil rights action. This Court could not decide this matter in Ellison's favor, or grant him relief, without specifically invalidating the actions of the state courts. This is precisely the course of action precluded by the Rooker-Feldman doctrine. See Lance v. Dennis, 546 U.S. 459, 464 (2006); see also Miller, 586 F.3d at 59. Accordingly, I recommend that Ellison's claim that his civil rights have been violated in the litigation of his restitution matter in the state courts be dismissed pursuant to the Rooker-Feldman doctrine.

II. Fraud and Theft Claims

Ellison complains that defendants have, individually and in conspiracy with one another, committed fraud and theft against him. To the extent Ellison intends to assert a civil cause of action regarding these actions, such claims are barred by the Rooker-Feldman doctrine, as explained above, and should be dismissed.

To the extent that Ellison intends to assert that the defendants named here have committed criminal acts, and that he has a right to have these individuals prosecuted criminally, his claims fare no better. There is no federal constitutional right to have criminal wrongdoers brought to justice, and therefore,

there is no private right of action under § 1983 for the failure to prosecute a particular crime. See Leeke v. Timmerman, 454 U.S. 83, 87 (1981); Nieves-Ramos v. Gonzalez-De-Rodriguez, 737 F. Supp. 727, 728 (D.P.R. 1990) (citing Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) ("a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another")). Ellison cannot, therefore, maintain any action seeking the criminal investigation or prosecution of the defendants. I recommend, therefore, that Ellison's theft and fraud claims against defendants be dismissed.

III. Property Claim

Ellison claims that he was improperly deprived of property -- money from his inmate account -- and has thereby suffered financial harm. It is not apparent that this matter was litigated in, or is necessarily inextricably intertwined with, the claims Ellison previously litigated in the state courts. To the extent that this claim is not precluded by Rooker-Feldman, therefore, I will consider it.

Claims alleging the theft, damage, loss or other misappropriation of property are not actionable under 42 U.S.C. § 1983 where, as here, the state has an adequate post-deprivation remedy available. See Hudson v. Palmer, 468 U.S. 517, 533 (1984); Lowe v. Scott, 959 F.2d 323, 340 (1st Cir.

1992); see also N.H. Rev. Stat. Ann. 541-B:9(II) & (IV), and 541-B:14 (1997) (providing post-deprivation means of recouping property loss attributable to State). If Ellison believes that money was improperly removed from his inmate account, he has an adequate post-deprivation state law remedy available to him to address the matter. Accordingly, I recommend that Ellison's property claim be dismissed as not cognizable under § 1983.

IV. State Law Claims

Ellison asserts that the claims he raises violate his rights under state as well as federal law. Under 28 U.S.C. § 1367(a), the district court has supplemental jurisdiction over state law claims that arise from the same nucleus of operative facts as the federal claims raised in the action. See Roche v. John Hancock Mut. Life Ins. Co., 81 F.3d 249, 256 (1st Cir. 1996). If the court dismisses all claims over which it has original jurisdiction, or if the state law claims would substantially predominate over the remaining federal claims, the court may decline to exercise its supplemental jurisdiction over those state law claims. See 28 U.S.C. § 1367(c). If this recommendation is approved, all of the asserted federal claims in this action will be dismissed. The state law claims raised, therefore, should also be dismissed.

Conclusion

For the foregoing reasons, I recommend dismissal of this matter in its entirety. Any objections to this Report and Recommendation must be filed within fourteen (14) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the district court's order. See Fed. R. Civ. P. 72(b)(2); Rodriguez-Mateo v. Fuentes-Agostini, 66 Fed. App'x. 212, 213 n.3 (1st Cir. 2003); Sunview Condo. Ass'n v. Flexel Intern., Ltd., 116 F.3d 962, 964 (1st Cir. 1997).



Landya B. McCafferty
United States Magistrate Judge

Date: November 18, 2010

cc: Tony L. Ellison, pro se

LBM:jba